The Indiana Prosecutor

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Plea Agreements and Appellate Review of Sentences

Since last June when the Indiana Supreme Court decided defendants could appeal the appropriateness of their sentences even after pleading guilty, there has been multiple defendants who have sought such review. In *Childress v. State/Carroll v. State*, 848 N.E.2d 1073 (Ind. 2006) the Court found that Indiana Appellate Rule 7 (B) allowed defendants to challenge sentences where trial judges were given discretion in allocating a sentence. In response to these cases Deputy Attorney General George Sherman wrote the following request:

> I know many prosecutors (and victims) are growing weary of defendants challenging their sentences following a guilty plea. Since a more relaxed standard of review under Indiana Appellate Rule 7(B) was made effective in 2003, it has been easier for defendants to convince an appellate court that his or her sentence should be revised. One possible remedy to this problem is negotiating with the defendant for a term in the

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> plea agreement stating that the defendant waives his right to challenge the trial court's finding and balancing of mitigating and aggravating factors and further waives his right to have the Court of Appeals review his sentence under Indiana Appellate Rule 7(B). Or the provision could simply state that the defendant waives his right to appeal any sentence imposed by the trial court that is within the range set forth in the plea agreement. In a recent memorandum opinion, the Court of Appeals held that plea provisions through which defendants waive their right to appeal a sentence are enforceable. See: This has long been the rule in the federal courts of appeals. *See e.g.*, *United States v. Lockwood*, 416 F.3d 604, 608 (7th Cir. 2005); *United States v. Hare*, 269 F.3d 859, 860 (7th Cir. 2001); *United States v. Barnes*, 83 F.3d 934, 941 (7th Cir. 1996).

Unfortunately, the Indiana Court of Appeals was unwilling to publish the memorandum opinion noted above, and thereby inform (or remind) prosecutors that they have this option in plea negotiations. However, I would suggest informing prosecutors of the decision, as there appears to be no published opinions on this particular issue in Indiana. I would also recommend that if prosecutors are able to secure such a waiver, that they specifically point out the waiver provision during the guilty plea hearing so that a defendant cannot later claim on appeal that he was unaware of the provision and did not knowingly waive his right to appeal his sentence.

Steve Johnson raised one additional consideration, a challenge to the erroneous sentence. His suggestion is to include the following language in addition to George's suggestions. "I knowingly, intelligently, and voluntarily waive my right to challenge the sentence on the basis that it is erroneous."

Adoption of these suggestions will hopefully reduce the Appellate Court challenges to sentences allowing prosecutors to convey to victims with confidence that the defendant will serve the sentence he was given under his plea.

Inside this Issue

United States Supreme Court and Court of Appeals Recent Decisions

- 7th Circuit finds that use of a GPS tracking device is not a search under the 4th Amendment.

US v. Garcia, 2007 U.S. App. LEXIS 2272 (US Ct. App 7th Cir. 2/2/07). The 7th Circuit analyzed whether evidence gained due to a tracking device attached to a car was unconstitutionally obtained. Police were notified by two separate persons that Bernardo Garcia, a previously convicted methamphetamine user, had told acquaintances the he wanted to start manufacturing methamphetamine again. Garcia bragged to a cohort that he could manufacture meth in front of a police station without getting caught. Police viewed a store video tape which caught Garcia buying ingredients for methamphetamine. A third person informed authorities that Garcia was driving a borrowed Ford Tempo. Law Enforcement found the Tempo parked on a city street and attached a GPS "memory tracking" unit underneath the car's rear bumper. The device recorded the car's travel history. After the GPS device was recovered, police were able to identify a pattern of travel to a particular tract of land. After obtaining consent to search the premises from the owner, officers found equipment and materials used to manufacture methamphetamine. During the property search, Garcia arrived in his vehicle. Police then searched his car finding additional evidence. Garcia was charged and convicted of manufacturing methamphetamine.

The Court found that using a GPS tracker DID NOT constitute a search under the Fourth Amendment.

Defendant's only post conviction argument was that by attaching a GPS monitor to his car the police were effectively seizing and searching his vehicle. He argued that the police needed not only to provide probable cause to monitor his vehicle, but should have obtained a warrant as well. The District Court found that the officers had reasonable suspicion to believe that Garcia was committing a criminal action and that was sufficient to attach the GPS monitor to his car.

On Appeal, the Court found that the GPS device did not affect the way the car operated, didn't take up room that would otherwise be occupied, and didn't alter the vehicle's appearance. Therefore it didn't amount to a seizure. Whether the car was searched was a little more difficult to answer and depended on the technology. The Court noted, that in past US Supreme Court decisions such as *US v. Knotts*, 460 U.S. 276 (1983) tracking a vehicle on a public street was not considered a search. What the police can do on their own, which is not a search, doesn't become a search just because technology is utilized. In the Knotts case, the US Supreme Court found that a beeper that gave a signal as to the location of a car was just an enhanced version of police officer vision. A police car could have followed the defendant's car while it was on a public street and that wouldn't have amounted to a search. By attaching the beeper to report the location of the car, the officers were able to drop back yet obtain the same information. The following year the Supreme Court clarified the Knotts decision by deciding *US v. Karo*, 468 US 705 (1984). In that decision the court held that while the car was located on a public thoroughfare the attached beeper was not a search. However, when the car drove upon private property, an area where police would not normally have access, the signal from the beeper became a search. In that case, the beeper was contained inside a barrel that was unloaded and taken into a building.

Looking at the tracking system used in this case, the court noted that while the system relied on a satellite to assist Law Enforcement in monitoring the movements of the vehicle, it was no different than monitoring travel through the use of lamp post cameras or satellite imaging as in Google Earth both of which have been found not to be searches. The use of the GPS system was just a 21st Century use of an investigative tool which substituted for the traditional law enforcement technique of tailing a suspect. The Court found that using a GPS tracker did not constitute a search under the Fourth Amendment.

The Court then discussed the potential misuse of such a system should it be applied wide scale tracking people for whom law enforcement randomly selected to follow. In its further evaluation of the issue, the Court noted that if technology continued or that mass wholesale use of tracking devices occurred there could be a possibility in the future of finding that in those circumstances the use of the device could potentially become a search subject to constitutional restrictions. In this case,

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however, the Court noted that the law enforcement officers of Wisconsin had ample reason for suspecting the defendant and his conviction was affirmed.

The interpretation of this case is somewhat confusing. The court finds there is no search and no seizure. Without saying so this would lead one to believe that there is no requirement of even reasonable suspicion before placing a monitor on the bumper of a car. They do note that the officers here had abundant reason for monitoring the car, without noting that this was necessary under their analysis. They also seem to intimate that should Law Enforcement abuse GPS monitoring they would be willing to revisit the issue. What you can take from this decision is that nothing more than reasonable suspicion is required before law enforcement places a GPS monitor on a car under the 7th Circuit Analysis and potentially not even that is required. However, the other Federal Circuits have not followed this logic with some requiring reasonable suspicion and others requiring probable cause.

An added note, this is based on just Federal Constitutional Analysis and potentially would not be followed by the Indiana Supreme Court who requires reasonable articulable suspicion for trash pulls. Arguing that no suspicion is required to attach a tracking device is probably one of those arguments that should be relied on after law enforcement has placed you in that bind and not when giving advice to law enforcement beforehand.

- United States Supreme Court finds Crawford does not apply retroactively

Whorton v. Bockting, U.S. Supreme Court 2/28/07. On February 28, 2007 the U.S. Supreme Court put to rest the argument of whether Crawford would be applied retroactively on collateral appeals. In *Crawford v. Washington*, 541 U.S. 36 (US 2004) the Court held that when a witness is not present for cross examination their testimonial statements can not be admitted into evidence without violating the defendants Sixth Amendment right to confront his accuser. In Whorton, the Court found that their holding in Crawford was a new rule of criminal procedure. Therefore, Crawford is not applicable to cases that had completed their direct appeal prior to the Court's decision in Crawford.

The application of Whorton will be helpful to prosecutors on PCRs. If the defendant had completed his appeal before Crawford was decided, he is prohibited from arguing that Crawford should have applied and testimonial statements should have been suppressed.

Indiana Court of Appeals Recent Decisions

- Officer need not be in uniform if there is no direct contact with suspect.

Maynard v. State, 859 N.E.2d 1272 (Ind. Ct. App. 1/18/07). Larry Maynard's driving privileges were forfeited for life, yet on May 16, 2005 he was driving a car down a Greenfield street. Marshal Richard Jefford, II, while wearing civilian clothes, noticed Maynard driving. Believing that Maynard's license was suspended, Marshal Jefford wrote down Maynard's license plate number but did not try and stop the car. After confirming that Maynard was indeed suspended for life, Marshal Jefford drafted an information, probable cause affidavit and a written ticket which he left at the prosecutor's office. Maynard was subsequently charged with operating while privileges are forfeited for life as a Class C felony and later convicted of the charge.

On Appeal, Maynard claimed that Marshal Jefford violated I.C. 9-30-2-2 which requires that a law enforcement officer may not arrest or issue a traffic citation unless they are wearing a distinctive uniform and a badge of authority or operating a clearly marked police vehicle. In this case Jefford who was absent his badge was walking around in shorts, a tee shirt, and tennis shoes when he spotted Maynard.

The Court of Appeals reasoned that to apply the language of the statute to the situation presented here would not be logical and would bring about an "unjust or absurd result." In interpreting the legislative intent, they posed that officers who enforce traffic laws should wear uniforms so that the public would be able to distinguish true law enforcement officers from pretenders who might do harm to citizens. The Court noted that Jefford did not attempt to stop Maynard and had no direct contact with him. Since the legislative concern would not be addressed in this situation, there was no reason to construe I.C. 9-30-2-2 as requiring an officer to be in uniform when he only did administrative paper work. The Court held that where there was no contact between the parties, Indiana Code 9-30-2-2 does not apply.

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Recent Decisions (continued)

- Omitting information from a Search Warrant Affidavit can be fatal if it misleads the magistrate in finding probable cause.

In a case of first impression in Indiana, the Court of Appeals handed down *Ware v. State*, 859 N.E.2d 708 (Ind. Ct. App. 1/9/07) .

On July 24, 2005 several teenage boys threw eggs at cars driving by on a fairly well traveled road. One of the cars they struck was driven by Lisa Baker who stopped and yelled at the boys. The boys then struck a truck driven by the defendant, Donald Ware who pulled up next to Baker. He told Baker that he had a rifle and was going to get the boys. Ware drove off after the boys and fired two shots killing one boy and wounding another.

Officers arrived on the scene to investigate the egg throwing reports they had received. At the time officers were unaware that anyone had shot at the boys. When the first officer, Tracy Nash, arrived he saw Ware's truck leaving the scene at a high rate of speed and pull into a nearby parking lot. Nash spoke to Ware who told him he had been hit in the head by an egg and the boys had run behind a business. Nash asked Ware to wait while Nash went to look for the boys. When Nash returned Ware was gone. Later that evening officers learned the boys had been shot.

Baker was originally shown a photo array that did not contain Ware's photo. Baker made a positive identification of another man. That man was later ruled out as a suspect. After an anonymous phone call Ware became a suspect. Nash was shown a photo array containing Ware's photograph, and positively identified Ware. A search warrant was requested to search Ware's house and truck based on the following information:

(1) the boys identified the shooter as a white male who was driving a red pickup truck;
(2) Baker spoke with a white male operating a red pickup truck and talking on a cellular phone who told her he had a gun and was going to pursue the boys;
(3) Officer Nash spoke with a white male operating a red Ford F150 pickup truck who pointed him in the direction of the boys and left the scene before Officer Nash returned;
(4) Officer Scheid received an anonymous call indicating that the white male who shot Dunson is named "Donny", lives in Avon, Indiana, and drives a red pickup truck with a toolbox in the bed. The caller stated that Donny told her on the night of the shooting that he had shot at someone who had egged him. The caller further stated that Donny sells drugs and had remained in his home since the day of the shooting. The caller finally provided Donny's cell phone number;
(5) Officer Boomershine undertook surveillance of the home identified by the anonymous caller and observed a red Ford F150 pickup with a toolbox in the bed and a white male who appeared to be approximately 5'10" and 200 pounds;
(6) The license plate on the pickup truck indicated that the truck was registered to Terri Eberwein;
(7) Ware's arrest record indicated that when he had been arrested for possession of cocaine, operating while intoxicated, and resisting arrest, he had been driving a red pickup truck with the same VIN as the truck registered to Eberwein;
(8) The cell phone records for the number supplied by the anonymous caller indicated that Eberwein was the subscriber;
(9) Officers learned from a "Justis Bail Interview" that Ware had previously lived with Eberwein;
(10) Officer Nash picked Ware's photograph out of an array, identifying him as the man with whom he spoke at the scene of the shooting."

After the search Officers found eggshells and residue in and on Ware's Truck and forty-nine grams of marijuana in his residence. Ware eventually admitted being at the scene but did not admit to shooting at the boys. A motion to suppress the evidence seized pursuant to the warrant was denied and Ware was convicted at trial.

On Appeal, Ware claimed that the search warrant was deficient. He argued that the probable cause affidavit was defective because the police failed to include that Baker had identified someone other than Ware as the suspected shooter and that most of the information had come from an anonymous source.

Indiana case law addresses situations where false information is included in a probable cause affidavit but is silent as to the procedure for reviewing affidavits when information is omitted. To determine whether the failure to include Baker's faulty identification affected the probable cause finding, the Appellate Court looked to Federal Law. They noted that a probable cause affidavit must contain all

material facts including those that "cast doubt on the existence of probable cause." The test is to combine the information that was omitted with the information contained in the affidavit to determine if the warrant was valid. To prevail, a defendant must show: "(1) that the police omitted facts with the intent to make, or in reckless disregard of whether they thereby made, the affidavit misleading... and (2) that the affidavit if supplemented by the omitted information would not have been sufficient to support a finding of probable cause." *US v. Lakloskey*, 462 F.3d 965, 978 (8th Cir. 2006).

At the suppression hearing, officers testified that while they knew Baker had identified someone else, through further investigation they had eliminated the identified person as a suspect. Had this information been included the magistrate would have had the misidentification of a person who had been ruled out as a suspect, as well as the positive identification from Officer Nash, the anonymous tip information that was partially corroborated, and Baker's statements indicating a white male in a red truck had said he was going after the boys with a gun. The court held that even if the omitted information had been included, the search warrant was still supported by probable cause and affirmed defendant's conviction.

The Court noted that it is not practical for police to include every detail in a probable cause affidavit but cautioned law enforcement to include any information that could conceivably affect a probable cause determination.

2007 Spring Seminar
June 1, 2007
Hyatt Regency
Downtown Indianapolis
More Details Coming Soon

New Traffic Safety Resource Prosecutor Named

The Indiana Prosecuting Attorneys Council welcomes Debbie Reasoner as our New Traffic Safety Resource Prosecutor. Debbie is a career prosecutor who began prosecuting in 1988. During her tenure she has worked as a Deputy Prosecutor in Marion, Hamilton, and Madison Counties. While Debbie has had experience in other areas of prosecution, most of her litigation experience is related to misdemeanor and OWI cases.

From 1998 to 2002, Debbie served as staff counsel for the Department of Toxicology. During that time she solidified her knowledge of the science behind OWI prosecution and participated in training Law Enforcement and Prosecutors on OWI litigation. Her work under Dr. Klaunig makes her a good fit for the TSRP position.

Debbie will be in the office beginning April 2nd and is excited to get started. She is looking forward to your calls and meeting many of you at Prosecuting the Drugged Driver on April 23rd.